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Before the
UNITED STATES COPYRIGHT ROYALTY BOARD

Library of Congress

Washington, D.C.

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In Re: : Docket No.
: 15-CRB-0001-WR
Determination of Royalty : (2016-2020)
Rates and Terms for : Volume 26-PUBLIC
Ephemeral Recording and : Pages 7121-7153
Digital Performance of : Pages 7185-7192
Sound Recordings (Web IV) : Pages 7232-7244
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PUBLIC SESSION

Washington, D.C.

Tuesday, June 2, 2015

The hearing in the above-entitled matter
was convened at 9:15 a.m.

BEFORE COPYRIGHT ROYALTY JUDGES:

SUZANNE M. BARNETT, CHIEF JUDGE

DAVID R. STRICKLER, JUDGE

JESSE FEDER, JUDGE

Capital Reporting Company
Day 26 In Re: Determination of Royalty Rates (Public) 06-02-2015

| 7122 | 7124 |
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| <p>1 APPEARANCES</p> <p>2 On behalf of SoundExchange:</p> <p>3 MUNGER TOLLES & OLSON, LLP</p> <p>4 GLENN POMERANTZ, ESQUIRE</p> <p>5 355 South Grand Avenue, 3rd Floor</p> <p>6 Los Angeles, California 90071</p> <p>7 213-683-9107</p> <p>8 On behalf of Pandora Media, Inc.</p> <p>9 WEIL GOTSHAL & MANGES, LLP</p> <p>10 TODD LARSEN, ESQUIRE</p> <p>11 767 Fifth Avenue</p> <p>12 New York, New York 10153</p> <p>13 212-310-8000</p> <p>14 On behalf of National Association of Broadcasters:</p> <p>15 WILEY REIN, LLP</p> <p>16 JILLIAN VOLKMAR, ESQUIRE</p> <p>17 1776 K Street, N.W.</p> <p>18 Washington, D.C. 20006</p> <p>19 202-719-7453</p> <p>20 On behalf of iHeartMedia, Inc.</p> <p>21 KELLOGG, HUBER, HANSEN, TODD,</p> <p>22 EVANS & FIGEL, PLLC</p> <p>23 MARK HANSEN, ESQUIRE</p> <p>24 1615 M Street, N.W.</p> <p>25 Suite 400</p> <p>Washington, D.C. 20036</p> <p>202-326-7992</p> <p>On behalf of SiriusXM Radio:</p> <p>ARENT FOX, LLP</p> <p>MARTIN CUNNIFF, ESQUIRE</p> <p>1717 K Street, N.W.</p> <p>Washington, D.C. 20006</p> <p>202-857-6000</p> | <p>1 CONTENTS</p> <p>2 EXAMINATION OF DIR CROSS RED REC</p> <p>3 JONATHAN BENDER</p> <p>4 BY MR. CHOUDHURY 7128</p> <p>5 BY MR. ANGSTREICH 7139</p> <p>6 BY MR. MILLS 7144</p> <p>7 EXAMINATION OF</p> <p>8 DARIUS VAN ARMAN</p> <p>9 BY MR. CHOUDHURY 7150</p> <p>10 BY MR. YOLKUT 7163</p> <p>11 EXAMINATION OF</p> <p>12 AARON HARRISON</p> <p>13 BY MS. LEMOINE 7189</p> <p>14 BY MR. LARSON 7201</p> <p>15 BY MR. THORNE 7225</p> <p>16 EXAMINATION OF</p> <p>17 STEVEN CUTLER</p> <p>18 BY MR. THORNE 7232</p> <p>19 BY MR. CHOUDHURY 7249</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> |
| 7123 | 7125 |
| <p>1 APPEARANCES (CONTINUED):</p> <p>2 On behalf of National Religious Broadcasters</p> <p>3 Noncommercial Music License Committee:</p> <p>4 WILEY REIN, LLP</p> <p>5 BRUCE JOSEPH, ESQUIRE</p> <p>6 1776 K Street, N.W.</p> <p>7 Washington, D.C. 20006</p> <p>8 202-719-7008</p> <p>9 On behalf of Educational Media Foundation:</p> <p>10 DAVID D. OXENFORD, ESQUIRE</p> <p>11 WILKINSON BARKER KNAUER, LLP</p> <p>12 2300 N Street, N.W.</p> <p>13 Suite 700</p> <p>14 Washington, D.C. 20037</p> <p>15 202-783-4141</p> <p>16 ALSO PRESENT:</p> <p>17 For SoundExchange:</p> <p>18 Martha Larraondo-Klipper, Melinda LeMoine, Anjan</p> <p>19 Choudhury, Colin Rushing, Rose Ehler and Jennifer</p> <p>20 Bryant</p> <p>21 For Pandora:</p> <p>22 Benjamin Marks and David Yolkut</p> <p>23 For iHeartMedia:</p> <p>24 John Thorne, Scott Angstreich, Caitlin Hall and</p> <p>25 Tres Williams</p> <p>For NAB:</p> <p>Michael Sturm, Christopher Mills, Suzanne Head</p> <p>For SiriusXM Radio:</p> <p>Cynthia Greer</p> <p>Bonnie L. Russo, Capital Reporting Company</p> | <p>1 EXHIBITS ADMITTED IN EVIDENCE</p> <p>2 SoundExchange</p> <p>3 Exhibit 23 Written Testimony of 7129</p> <p>4 Jonathan Bender</p> <p>5 Exhibit 30 Written Rebuttal Testimony 7150</p> <p>6 of Darius Van Arman</p> <p>7 Exhibit 469 Darius Van Arman 7169</p> <p>8 Congressional Testimony</p> <p>9 Exhibit 6 Written Testimony 7187</p> <p>10 Exhibit 16 Written Testimony 7187</p> <p>11 Exhibit 126 Written Testimony 7187</p> <p>12 Exhibit 18 Written Testimony 7187</p> <p>13 Exhibit 164-172 Attachments to Written 7187</p> <p>14 Testimony</p> <p>15 *Exhibit 168 also marked 269</p> <p>16 Exhibit 25 Written Rebuttal Testimony 7191</p> <p>17 of Aaron Harrison</p> <p>18 Exhibit 81-86 Attachments to Testimony 7191</p> <p>19 of Aaron Harrison</p> <p>20 Exhibit 1447 Spreadsheet of 7260</p> <p>21 Listening Hours</p> <p>22 Exhibit 1042 E-Mail 7269</p> <p>23 Exhibit 196 Slide Deck 7285</p> <p>24 Exhibit 968 Update on Direct Licensing 7294</p> <p>25 Efforts</p> <p>Exhibit 213 E-Mail 7319</p> <p>Exhibit 1372 E-Mail Chain 7320</p> <p>Exhibit 208 E-Mail 7325</p> <p>Exhibit 209 Attachment to E-Mail 7325</p> <p>Exhibit 1411 E-Mail 7328</p> <p>Exhibit 855 E-Mail 7335</p> <p>Exhibit 1187 List of Direct 7346</p> <p>License Deals</p> <p>Exhibit 1037 E-Mail 7348</p> <p>Exhibit 1136 E-Mail 7352</p> <p>Exhibit 1109 E-Mail 7353</p> <p>Exhibit 1117 E-Mail 7356</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> |

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| <p>1 EXHIBITS (CONTINUED):</p> <p>2 IHeartMedia</p> <p>3 Exhibit 3098 E-Mail Regarding Redline 7226</p> <p>4 of Term Sheet</p> <p>5 Exhibit 3099 Redline of Term Sheet 7226</p> <p>6 Exhibit 3338 Testimony of Steven Cutler 7234</p> <p>7 Exhibit 3339 Attachment to Testimony 7235</p> <p>8 of Steven Cutler</p> <p>9 Exhibit 3341 Attachment to Testimony 7235</p> <p>10 of Steven Cutler</p> <p>11 Exhibit 3346 Attachment to Testimony 7236</p> <p>12 of Steven Cutler</p> <p>13 Exhibit 3348 Attachment to Testimony 7236</p> <p>14 of Steven Cutler</p> <p>15 Exhibit 3350 Attachment to Testimony 7236</p> <p>16 of Steven Cutler</p> <p>17 NAB</p> <p>18 Exhibit 4006 Written Direct Testimony 7148</p> <p>19 of Julie Koehn</p> <p>20 Exhibit 4124-4125 Attachments to Testimony 7149</p> <p>21 of Julie Koehn</p> <p>22 Exhibit 4004 Written Direct Testimony 7149</p> <p>23 of Johnny Chiang</p> <p>24 Exhibit 4126-4127 Attachments to Testimony 7149</p> <p>25 of Johnny Chiang</p> <p>15 Exhibit 4007 Written Direct Testimony 7149</p> <p>16 of Jean-Francis Gadhoury</p> <p>17 Pandora</p> <p>18 Exhibit 5112 E-Mail dated 5-2014 7167</p> <p>19 Exhibit 5269 E-Mail dated 8-7-14 7175</p> <p>20 Exhibit 5028 Statement of Account 7221</p> <p>21 by Spotify</p> <p>22 NRBNNMLC</p> <p>23 Exhibit 7000 Written Testimony 7149</p> <p>24 of Joseph Emert</p> <p>25 Exhibit 7001-7010 Attachments to Testimony 7149</p> <p>of Joseph Emert</p> <p>26 Exhibit 7025-7026 Attachments to Testimony 7149</p> <p>of Joseph Emert</p> | <p>1 wait on this and I am certainly willing to do it at</p> <p>2 Your Honor's pleasure, but there was some witness</p> <p>3 testimony and exhibits that we agreed to offer. I</p> <p>4 can do it, I can do it later. I know we have a</p> <p>5 witness on the stand.</p> <p>6 CHIEF JUDGE BARNETT: Why don't we do</p> <p>7 it between witnesses.</p> <p>8 MR. JOSEPH: Thank you, Your Honor.</p> <p>9 CHIEF JUDGE BARNETT: Thank you.</p> <p>10 Mr. Choudhury.</p> <p>11 DIRECT EXAMINATION BY COUNSEL FOR</p> <p>12 SOUNDEXCHANGE</p> <p>13 BY MR. CHOUDHURY:</p> <p>14 Q. Good morning, Mr. Bender. Welcome</p> <p>15 back.</p> <p>16 A. Thank you.</p> <p>17 Q. I know you were here a few weeks ago</p> <p>18 with your direct testimony. I take it you also</p> <p>19 submitted rebuttal testimony in this proceeding?</p> <p>20 A. I did.</p> <p>21 Q. Can you turn to Tab 1 of your binder.</p> <p>22 What is this document?</p> <p>23 A. This is my rebuttal testimony.</p> <p>24 Q. Is the information in your written</p> <p>25 testimony true and correct?</p> <p>A. It is.</p> |
| 7127 | 7129 |
| <p>1 PROCEEDINGS</p> <p>2</p> <p>3 (PUBLIC SESSION)</p> <p>4</p> <p>5 CHIEF JUDGE BARNETT: Good morning.</p> <p>6 Please be seated.</p> <p>7 You have been here before, have you</p> <p>8 not?</p> <p>9 THE WITNESS: I have.</p> <p>10 CHIEF JUDGE BARNETT: You remain under</p> <p>11 oath. You may be seated.</p> <p>12 JONATHAN BENDER,</p> <p>13 having been previously duly sworn, to tell the</p> <p>14 truth, the whole truth and nothing but the truth,</p> <p>15 testified as follows:</p> <p>16 CHIEF JUDGE BARNETT: Ms. LeMoine and</p> <p>17 Ms. Pope were going to resolve something but they</p> <p>18 are not here this morning.</p> <p>19 MR. ANGSTREICH: Ms. LeMoine sent an</p> <p>20 e-mail to either the group or to you as well saying</p> <p>21 that she couldn't be here today and asked you to do</p> <p>22 it tomorrow morning.</p> <p>23 CHIEF JUDGE BARNETT: That will be</p> <p>24 fine.</p> <p>25 MR. JOSEPH: Your Honor, I was going to</p> | <p>1 MR. CHOUDHURY: Your Honor, at this</p> <p>2 time we'd move for admission of SX 23.</p> <p>3 CHIEF JUDGE BARNETT: Hearing no</p> <p>4 objection, 23 is admitted.</p> <p>5 (SoundExchange Exhibit 23 was admitted</p> <p>6 into evidence.)</p> <p>7 BY MR. CHOUDHURY:</p> <p>8 Q. Could I also ask you to turn to Tab 2</p> <p>9 of your binder.</p> <p>10 MR. CHOUDHURY: It is 23.</p> <p>11 CHIEF JUDGE BARNETT: I thought that is</p> <p>12 what you said. I looked at it, oddly enough.</p> <p>13 BY MR. CHOUDHURY:</p> <p>14 Q. If you could turn to Tab 2.</p> <p>15 A. Yes.</p> <p>16 Q. What is this document?</p> <p>17 A. These are the reply comments of</p> <p>18 SoundExchange.</p> <p>19 Q. And did you have input into the</p> <p>20 creation of these comments?</p> <p>21 A. I did.</p> <p>22 Q. Are these the same comments you refer</p> <p>23 to in your written rebuttal testimony?</p> <p>24 A. They are.</p> <p>25 Q. And these are comments you reviewed in</p> |

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| <p>1 putting together your testimony?</p> <p>2 A. Yes.</p> <p>3 MR. CHOUDHURY: Your Honor, we'd move</p> <p>4 introduce into evidence SX 125.</p> <p>5 MR. MILLS: Objection. Hearsay.</p> <p>6 MR. ANGSTREICH: Same objection.</p> <p>7 CHIEF JUDGE BARNETT: Thank you for not</p> <p>8 me tooing.</p> <p>9 MR. MILLS: Can I expand, Your Honor?</p> <p>10 CHIEF JUDGE BARNETT: You may.</p> <p>11 MR. MILLS: It's a 96-page document for</p> <p>12 legal argument that has been entered into the</p> <p>13 notice of record another proceeding that is before</p> <p>14 the judges in that proceeding.</p> <p>15 CHIEF JUDGE BARNETT: Yes, it is. And</p> <p>16 we can take official notice and we will do that</p> <p>17 rather than admitting it into this proceeding.</p> <p>18 Unless there is particular reason you think it</p> <p>19 needs to be a part of this record in this</p> <p>20 proceeding.</p> <p>21 MR. CHOUDHURY: No, Your Honor, that is</p> <p>22 fine by us.</p> <p>23 Mr. Nichols, if you could put up the</p> <p>24 slide please.</p> <p>25 BY MR. CHOUDHURY:</p> | <p>1 amount it owes.</p> <p>2 How would this downward adjustment</p> <p>3 affect SoundExchange's operations?</p> <p>4 A. This presents a real operational burden</p> <p>5 and a lot of complexity. The first thing you do is</p> <p>6 you have to go back to the period in question and</p> <p>7 in effect undistribute that log. We have to roll</p> <p>8 back all of the payments, all the transactions,</p> <p>9 hundreds of thousands of lines and logs and then</p> <p>10 recalculate based on the new number and then come</p> <p>11 up with a net difference, which we have to report</p> <p>12 to all of our 25,000 pays.</p> <p>13 Q. When you report to pays, how do you go</p> <p>14 about doing that?</p> <p>15 A. We create debits in their account which</p> <p>16 will appear in their next royalty statement.</p> <p>17 Q. How do the debits work to claw back</p> <p>18 royalty?</p> <p>19 A. So if you have a debit in your account,</p> <p>20 as a new income stream from royalties comes in, we</p> <p>21 will take the debit from that new royalty stream.</p> <p>22 Q. And do you have to notify the payees of</p> <p>23 this?</p> <p>24 A. It's in their royalty statement. They</p> <p>25 will see it but we will get a lot of calls.</p> |
| 7131 | 7133 |
| <p>1 Q. Mr. Bender, if you could take a look at</p> <p>2 the slide, are these the term's proposals discussed</p> <p>3 in your rebuttal testimony?</p> <p>4 A. Yes.</p> <p>5 Q. Mr. Bender, we're going to go through</p> <p>6 every single one of these this morning, right?</p> <p>7 A. No thank you.</p> <p>8 Q. So we are just going to focus on a</p> <p>9 couple, right?</p> <p>10 A. Yes.</p> <p>11 Q. If I could ask you to -- first, let's</p> <p>12 talk about the statement of accounts corrections</p> <p>13 and overpayments.</p> <p>14 Now Pandora has proposed that the</p> <p>15 services should be allowed to make good-faith</p> <p>16 revisions to statements of accounts.</p> <p>17 A. Yes.</p> <p>18 Q. Do you agree with that proposal?</p> <p>19 A. No.</p> <p>20 Q. And who is responsible for the accuracy</p> <p>21 of a statement of account in the first instance?</p> <p>22 A. The services themselves.</p> <p>23 Q. So now I want you to imagine that a</p> <p>24 service submits a statement of account and many</p> <p>25 months later, adjusts the statement to reduce the</p> | <p>1 Q. And when you get those calls, what</p> <p>2 kinds of issues do you have to deal with with the</p> <p>3 payees?</p> <p>4 A. For artists in particular, you run into</p> <p>5 tax issues, depending on the timing of the</p> <p>6 restatement, they may have to readjust their taxes,</p> <p>7 refile their tax returns. Similarly, a lot of</p> <p>8 artists have agreements with producers who produce</p> <p>9 their records who share in their royalty stream.</p> <p>10 If the royalty stream changes, they have to go back</p> <p>11 to the producers and readjust the payment to the</p> <p>12 producers.</p> <p>13 Q. Those are issues that SoundExchange has</p> <p>14 to then deal with when it notifies the payees?</p> <p>15 A. Absolutely.</p> <p>16 Q. If a deduction is assessed on an</p> <p>17 artist's royalty statement, is that always</p> <p>18 recovered?</p> <p>19 A. No, it's not. In fact, experience</p> <p>20 shows that there is -- often, you know, they won't</p> <p>21 be able to recover all of the debit.</p> <p>22 Q. What happens if the debit isn't</p> <p>23 recovered?</p> <p>24 A. This creates unrecoverable debt on --</p> <p>25 unrecoverable debt on our books which we attempt to</p> |

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| <p style="text-align: right;">7134</p> <p>1 recover over time but after a certain period, we 2 take it against our administration fee. 3 Q. And who was the administration fee -- 4 MR. ANGSTREICH: If I can object to 5 that last -- I have been searching, as Mr. 6 Choudhury has been going through, I just can't find 7 any of this in Mr. Bender's rebuttal testimony. 8 There's references -- there is a paragraph on this 9 proposal, but I don't see the treatise we have just 10 gotten. 11 MR. CHOUDHURY: Your Honor, if you look 12 on Page 5, and I will point you to -- four lines up 13 from the bottom, I think he's just explaining where 14 he says the statements of account, these 15 corrections are disruptive of the orderly and 16 efficient flow of royalties. 17 MR. ANGSTREICH: That is a lot packed 18 into six words, what we just heard from Mr. Bender. 19 CHIEF JUDGE BARNETT: It is, but I 20 think it is of assistance to the judges to 21 understand what those words entail. Please unpack, 22 if you will. 23 BY MR. CHOUDHURY: 24 Q. So Mr. Bender, who is the 25 administrative fee assessed against?</p> | <p style="text-align: right;">7136</p> <p>1 A. That's fine. 2 Q. Let's move on to Pandora's proposal 3 about the late fee. 4 A. Yes. 5 Q. Pandora proposes to have only one late 6 fee applied to both the statement of accounts and 7 the royalty payment. Are you aware of that 8 proposal? 9 A. Yes. 10 Q. Do you agree with that proposal? 11 A. No, I don't. 12 Q. In your testimony, you say that royalty 13 payments and statements of accounts serve different 14 functions. 15 A. That's right. 16 Q. What do you mean by that? 17 A. Well, the statement of accounts is the 18 service's self-reporting calculation of what the 19 royalty liability is for a given broadcast period, 20 whereas the payment is simply a transfer of funds 21 from their bank to our bank. 22 Q. So let's just take this one step at a 23 time. Let's say you have a service that's going to 24 be late on their royalty payment. 25 A. Yes.</p> |
| <p style="text-align: right;">7135</p> <p>1 A. All of our payees share equally, so in 2 this case, the debit of an individual artist would 3 be spread out, I guess, unfairly across everybody. 4 Q. Now let's say there is a downward 5 correction because the services overpaid or claims 6 to have overpaid. Do you think SoundExchange 7 should make an interest payment back to the service 8 for the overpayment amount? 9 A. No. That's actually a little crazy, we 10 have already paid out the money. That money is 11 gone. I don't know where we would earn the 12 interest. 13 Q. Mr. Bender, how frequently do you 14 receive these downward adjustment requests from 15 services? 16 A. Pretty infrequently. We haven't 17 allowed them beyond a 90-day window. 18 Q. Can you think of any recent examples? 19 A. We actually did have a recent example 20 with a large Webcaster as asserted. 21 Q. Mr. Bender, I should tell you, we are 22 in open session so, you know, if we want to talk 23 about any specifics, we need to go in closed 24 session, maybe we can get back to that at the end 25 if we need to.</p> | <p style="text-align: right;">7137</p> <p>1 Q. Is there any value to SoundExchange to 2 getting the statement of account in that instance 3 before the royalty payment? 4 A. Absolutely. There is knowing that the 5 service has acknowledged a royalty liability for 6 the broadcast period is a great help to us because 7 then our operationally, one, we have a liability on 8 the books, a receivable, and when we go to enforce 9 the collection, we are able to go to the services, 10 you filed this statement of account for this 11 amount, can you tell us when this payment will be 12 forthcoming. 13 Q. Do you think if Pandora's proposal is 14 adopted that you will be receiving in that instance 15 the statements of accounts that trail the royalty 16 rate? 17 MR. ANGSTREICH: Objection, Your Honor, 18 calls for speculation on the part of the witness. 19 CHIEF JUDGE BARNETT: Sustained. 20 BY MR. CHOUDHURY: 21 Q. Now let's talk about the other 22 instance. Say you have a service that is going to 23 be late on its royalty payments, would there be -- 24 or I think that may have been the one I just did. 25 Let me ask about the other. Let's say</p> |

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| 7138 | <p>1 that you have a statement that is going to be late</p> <p>2 on their statement of -- a service that's going to</p> <p>3 be late on their statement of account. Is there a</p> <p>4 benefit to you in receiving the royalty payment</p> <p>5 before that?</p> <p>6 A. Absolutely. It is good to have the</p> <p>7 payment and similarly, it lets us know that the</p> <p>8 service acknowledges a royalty obligation for that</p> <p>9 royalty period, and again, that is, you know, we go</p> <p>10 back to the service and say we received your</p> <p>11 payment, when can we get the calculation and the</p> <p>12 statement of account.</p> <p>13 Q. Now, what role does the late fee</p> <p>14 provision play in SoundExchange's operations?</p> <p>15 A. It is crucial. It's the only tool that</p> <p>16 we have to ensure that services pay on a timely</p> <p>17 basis.</p> <p>18 Q. Do you have any operation staff you</p> <p>19 dedicate to late fee issues?</p> <p>20 A. Yes, we have a licensed relations group</p> <p>21 that their sole function is to work with</p> <p>22 licensees --</p> <p>23 MR. ANGSTREICH: Again, Your Honor,</p> <p>24 move to strike again. This is not in the</p> <p>25 testimony.</p> | 7140 | <p>1 include any analysis that compares the</p> <p>2 administrative costs you contend SoundExchange</p> <p>3 incurs with the amount SoundExchange recovers under</p> <p>4 the 1.5 percent late fee, does it?</p> <p>5 A. Except there's extra staff to deal with</p> <p>6 this.</p> <p>7 Q. But your testimony doesn't attempt to</p> <p>8 compare the collections under the late fee with the</p> <p>9 costs SoundExchange incurs, does it?</p> <p>10 A. We analyze each transaction and assign</p> <p>11 a cost to each transaction that we get.</p> <p>12 Q. There are no numbers in your testimony</p> <p>13 that say, we incur --</p> <p>14 A. That's right.</p> <p>15 Q. -- this much in costs and we recover</p> <p>16 this much in late fees. It's not in there, is it?</p> <p>17 A. Not on a transaction basis, no.</p> <p>18 Q. Not on any basis.</p> <p>19 A. \$30 million is our administrative fee.</p> <p>20 Q. But you also testified that -- you are</p> <p>21 aware that iHeartMedia has proposed using the tax</p> <p>22 underpayment penalty in place of the 1.5 percent</p> <p>23 late payment fee, correct?</p> <p>24 A. Yes, I am aware of that.</p> <p>25 Q. You testified that that penalty which</p> |
| 7139 | <p>1 CHIEF JUDGE BARNETT: Sustained.</p> <p>2 BY MR. CHOUDHURY:</p> <p>3 Q. Let me ask you one more question, Mr.</p> <p>4 Bender: If the late fee provision was weakened,</p> <p>5 how would that affect SoundExchange's operations?</p> <p>6 A. We would get a lot more late payments</p> <p>7 and late statements and the net result is artists</p> <p>8 would get paid later and later.</p> <p>9 MR. CHOUDHURY: That's all my</p> <p>10 questions.</p> <p>11 CHIEF JUDGE BARNETT: Thank you,</p> <p>12 Mr. Choudhury.</p> <p>13 CROSS-EXAMINATION BY COUNSEL FOR</p> <p>14 IHEARTMEDIA</p> <p>15 BY MR. ANGSTREICH:</p> <p>16 Q. Good morning, Mr. Bender.</p> <p>17 A. Good morning.</p> <p>18 Q. So you testified that SoundExchange</p> <p>19 incurs administrative costs when payments or the</p> <p>20 statement of accounts are submitted late; isn't</p> <p>21 that right?</p> <p>22 A. That's right.</p> <p>23 Q. But your rebuttal testimony doesn't</p> <p>24 include any quantification of those costs, does it?</p> <p>25 A. No.</p> <p>Q. And your rebuttal testimony doesn't</p> | 7141 | <p>1 the IRS uses doesn't create sufficient incentive to</p> <p>2 meaningful encourage timely submission of payments</p> <p>3 and statements of accounts, don't you?</p> <p>4 A. That's correct.</p> <p>5 Q. But your rebuttal testimony doesn't</p> <p>6 include any analysis of the incentives that either</p> <p>7 of these late fees propose or create, does it?</p> <p>8 A. Incentives -- I mean, the IRS has other</p> <p>9 tools, we do not.</p> <p>10 Q. You testified that it doesn't</p> <p>11 meaningful encourage, correct?</p> <p>12 A. Say it again.</p> <p>13 Q. Your testimony is that the tax</p> <p>14 underpayment penalty would not meaningfully -- or</p> <p>15 create sufficient incentive to meaningfully</p> <p>16 encourage timely submission of payments, does it?</p> <p>17 A. That's right, yes.</p> <p>18 Q. But you have done no analysis to</p> <p>19 quantify the level of incentive that that would</p> <p>20 create as compared to the 1.5 percent late fee,</p> <p>21 have you?</p> <p>22 A. It's much lower.</p> <p>23 Q. Okay. You testified also that 30 days</p> <p>24 would give the services more than enough time to</p> <p>25 submit accurate accounting statements, don't you?</p> |

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| 7142 | <p>1 A. Yes.</p> <p>2 Q. But again, your rebuttal testimony does</p> <p>3 not identify any of the steps that a service has to</p> <p>4 undertake in order to create that statement, does</p> <p>5 it?</p> <p>6 A. No, I didn't lay it out.</p> <p>7 Q. Your rebuttal testimony doesn't</p> <p>8 quantify how long any of those steps take, does it?</p> <p>9 MR. CHOUDHURY: Objection, Your Honor.</p> <p>10 This is actually about his direct testimony.</p> <p>11 That's where he makes the 30-day proposal. This is</p> <p>12 beyond the scope.</p> <p>13 BY MR. ANGSTREICH:</p> <p>14 Q. If you could look, Mr. Bender, at Page</p> <p>15 6 of your written rebuttal testimony.</p> <p>16 A. Yes.</p> <p>17 Q. And on Page 6 of your written rebuttal</p> <p>18 testimony, don't you say that 30 days would give</p> <p>19 the services more than enough time to submit</p> <p>20 accurate accounting statements?</p> <p>21 A. Yes.</p> <p>22 MR. CHOUDHURY: Your Honor.</p> <p>23 CHIEF JUDGE BARNETT: In my direct</p> <p>24 testimony, I explain that a 30 day -- okay, so we</p> <p>25 are past.</p> | 7144 |
| 7143 | <p>1 MR. ANGSTREICH: He is responding --</p> <p>2 but he is rebutting our proposal which he didn't</p> <p>3 have at the time of his direct statement to keep it</p> <p>4 at 45 days.</p> <p>5 CHIEF JUDGE BARNETT: You can ask</p> <p>6 questions about what is wrong with 45, but he's</p> <p>7 already explained the 30.</p> <p>8 MR. ANGSTREICH: Okay.</p> <p>9 BY MR. ANGSTREICH:</p> <p>10 Q. Mr. Bender, you understand that</p> <p>11 SoundExchange's proposal is that if a licensee</p> <p>12 underpays, a 1.5 percent late fee should apply,</p> <p>13 right?</p> <p>14 A. That's correct.</p> <p>15 Q. And you understand further that under</p> <p>16 SoundExchange's proposal, if the licensee makes a</p> <p>17 mistake and overpays, the labels and artists get to</p> <p>18 keep that unearned money; isn't that right?</p> <p>19 A. That's correct.</p> <p>20 Q. That's true even if the licensee</p> <p>21 notifies SoundExchange the next month of the</p> <p>22 mistake; isn't that right?</p> <p>23 A. That's correct.</p> <p>24 Q. Isn't it true, Mr. Bender, that</p> <p>25 SoundExchange has a process for adjusting</p> | 7145 |

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| 7146 | <p>1 Mr. Gadhoury?</p> <p>2 A. Yes.</p> <p>3 Q. And in his testimony, Mr. Gadhoury</p> <p>4 identified some technical issues that could be</p> <p>5 encountered in counting streaming performances</p> <p>6 which might result in a performance being counted</p> <p>7 twice, correct?</p> <p>8 A. Yes.</p> <p>9 Q. Your testimony does not assert that the</p> <p>10 technical issues cited by Mr. Gadhoury are</p> <p>11 implausible, correct?</p> <p>12 A. No. But the same IP address fails to</p> <p>13 acknowledge that my company has a single IP</p> <p>14 address, so all of my staff who are listening to</p> <p>15 Pandora at any given time would be on the same IP</p> <p>16 address.</p> <p>17 Q. But just to be clear, you are not</p> <p>18 asserting that the technical issues that Mr.</p> <p>19 Gadhoury raised are implausible, correct?</p> <p>20 A. I would say rare, if not implausible.</p> <p>21 Q. And you stated in your testimony that</p> <p>22 in your view, quote: "Any reconnection made by the</p> <p>23 same listener's device due to a technical glitch</p> <p>24 would not be a second performance under the</p> <p>25 regulations," correct?</p> | 7148 | <p>1 truth, and nothing but the truth, testified as</p> <p>2 follows:</p> <p>3 MR. CHOUDHURY: Your Honor, we are</p> <p>4 happy to start, but I didn't know if you wanted to</p> <p>5 do the exhibits first.</p> <p>6 CHIEF JUDGE BARNETT: Mr. Joseph, did</p> <p>7 you want to deal with some exhibits at this time?</p> <p>8 MR. JOSEPH: I'm happy to, Your Honor.</p> <p>9 I am trying to catch attention while we were</p> <p>10 transitioning, but -- while I am up, Your Honor,</p> <p>11 and I would offer the written direct testimony of</p> <p>12 Julie Koehn, K-O-E-H-N, that's NAB Exhibit 4006,</p> <p>13 the attachments to that testimony is NAB Exhibits</p> <p>14 4124 and 4125. The written direct testimony of</p> <p>15 Johnny Chiang, C-H-I-A-N-G, that's NAB 4004. The</p> <p>16 attachments to that testimony are NAB Exhibits 4126</p> <p>17 and 4127, and the written direct testimony of</p> <p>18 Jean-Francis Gadhoury, G-A-D-H-O-U-R-Y, that's NAB</p> <p>19 Exhibit 4007.</p> <p>20 MR. POMERANTZ: No objection, Your</p> <p>21 Honor.</p> <p>22 CHIEF JUDGE BARNETT: Those exhibits</p> <p>23 are admitted. Thank you.</p> <p>24 (NAB Exhibit 4006 was admitted into</p> <p>25 evidence.)</p> |
| 7147 | <p>1 A. Can you direct me to the line.</p> <p>2 Q. Sure. On Page 13 of your testimony,</p> <p>3 the fourth line down, you state: "Accordingly, any</p> <p>4 reconnection made by the same listener's device due</p> <p>5 to a technical glitch could not be a second</p> <p>6 performance under the current regulation," correct?</p> <p>7 A. Yeah.</p> <p>8 Q. I just asked if you said it, Mr.</p> <p>9 Bender.</p> <p>10 A. Yes, that's right.</p> <p>11 Q. Thank you.</p> <p>12 MR. MILLS: No further questions.</p> <p>13 CHIEF JUDGE BARNETT: Any other</p> <p>14 questions? Judges? Redirect?</p> <p>15 MR. CHOUDHURY: No redirect.</p> <p>16 CHIEF JUDGE BARNETT: Thank you, Mr.</p> <p>17 Bender. You are excused.</p> <p>18 THE WITNESS: Thank you very much.</p> <p>19 (Witness excused.)</p> <p>20 MR. POMERANTZ: Your Honor, our next</p> <p>21 witness is Mr. Van Arman.</p> <p>22 CHIEF JUDGE BARNETT: Good morning,</p> <p>23 Mr. Van Arman. You remain under oath.</p> <p>24 DARIUS VAN ARMAN, having been</p> <p>25 previously duly sworn, to tell the truth, the whole</p> | 7149 | <p>1 (NAB Exhibits 4124 and 4125 were</p> <p>2 admitted into evidence.)</p> <p>3 (NAB Exhibit 4004 was admitted into</p> <p>4 evidence.)</p> <p>5 (NAB Exhibits 4126 and 4127 were</p> <p>6 admitted into evidence.)</p> <p>7 (NAB Exhibit 4007 was admitted into</p> <p>8 evidence.)</p> <p>9 MR. JOSEPH: Thank you, Your Honor, and</p> <p>10 while I have the Courts here, I might as well press</p> <p>11 my luck. Pursuant to the agreement of the parties,</p> <p>12 I'm now wearing my NRBNMLC hat rather than my NAB</p> <p>13 hat, I would offer the written direct testimony of</p> <p>14 Joseph Emert, that's NAB -- that's E-M-E-R-T,</p> <p>15 that's NAB -- NRBNMLC Exhibit 7000 and the</p> <p>16 attachments Exhibit 7001, 2, 3, 4, 5, 6, 7, 8, 9</p> <p>17 and 10, along with NRBNMLC Exhibits 7025 and 7026</p> <p>18 pursuant to the agreement of the parties.</p> <p>19 MR. POMERANTZ: No objection, Your</p> <p>20 Honor.</p> <p>21 CHIEF JUDGE BARNETT: Those exhibits</p> <p>22 are admitted on behalf of NRBNMLC.</p> <p>23 (NRBNMLC Exhibits 7000 to 7010 were</p> <p>24 admitted into evidence.)</p> <p>25 (NRBNMLC Exhibits 7025 and 7026 were</p> |

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| 7150 | <p>1 admitted into evidence.)</p> <p>2 CHIEF JUSTICE BARNETT: Mr. Choudhury?</p> <p>3 DIRECT EXAMINATION BY COUNSEL FOR</p> <p>4 SOUNDEXCHANGE</p> <p>5 BY MR. CHOUDHURY:</p> <p>6 Q. Mr. Van Arman, welcome back. It is</p> <p>7 like a reunion in this place.</p> <p>8 You were previously here in the direct</p> <p>9 phase. Did you also prepare rebuttal testimony?</p> <p>10 A. Yes, I did.</p> <p>11 Q. If you can turn to Tab 2 in your</p> <p>12 binder.</p> <p>13 Is this your written rebuttal</p> <p>14 testimony?</p> <p>15 A. It is.</p> <p>16 Q. Is the information in your written</p> <p>17 rebuttal testimony true and correct?</p> <p>18 A. Yes.</p> <p>19 MR. CHOUDHURY: Your Honor, we'd move</p> <p>20 for the admission of SX 30.</p> <p>21 MR. YOLKUT: No objection, Your Honor.</p> <p>22 CHIEF JUDGE BARNETT: 30 is admitted.</p> <p>23 (SoundExchange Exhibit 30 was admitted</p> <p>24 into evidence.)</p> <p>25 BY MR. CHOUDHURY:</p> <p>Q. Mr. Van Arman, what is the subject of</p> | 7152 | <p>1 Q. How would they have such access?</p> <p>2 A. They would be able to use the statutory</p> <p>3 license to use our repertoire.</p> <p>4 Q. So that statutory license, would that</p> <p>5 set the rates and terms for your relationship</p> <p>6 absent a deal?</p> <p>7 A. Yes, they would be paying the statutory</p> <p>8 Pureplay rates.</p> <p>9 Q. So when you opted in to the license,</p> <p>10 how did you intend to affect the relationship</p> <p>11 between your labels and Pandora?</p> <p>12 A. It was -- from our perspective, it was</p> <p>13 going to be a modification to the statutory license</p> <p>14 that would otherwise prevail.</p> <p>15 Q. And in the absence of a statutory</p> <p>16 license, would you have opted in to the</p> <p>17 Pandora-Merlin license?</p> <p>18 A. No, we would not.</p> <p>19 Q. So when you were here last time, you</p> <p>20 were asked about whether you would agree to a</p> <p>21 license that included play sharing.</p> <p>22 Do you recall that?</p> <p>23 A. I do.</p> <p>24 Q. What was the example of the license you</p> <p>25 were referring to there?</p> |
| 7151 | <p>1 your written rebuttal testimony?</p> <p>2 A. This rebuttal testimony is in response</p> <p>3 to the previous testimony in this rate proceeding</p> <p>4 and specifically addresses the Pandora-Merlin</p> <p>5 agreement.</p> <p>6 Q. Let me ask you: How do you know about</p> <p>7 the Pandora-Merlin license?</p> <p>8 A. My companies received an opt-in notice</p> <p>9 from Merlin outlining the deal terms and as an</p> <p>10 observer on the Merlin board, I was part of higher</p> <p>11 level discussions about the Pandora-Merlin</p> <p>12 agreement.</p> <p>13 MR. CHOUDHURY: Mr. Nichols, if you</p> <p>14 could put up the slide.</p> <p>15 BY MR. CHOUDHURY:</p> <p>16 Q. Mr. Van Arman, if you could take a look</p> <p>17 at the slide. Is this an accurate summary at a</p> <p>18 high level of the points discussed in your written</p> <p>19 testimony?</p> <p>20 A. Yes.</p> <p>21 Q. So let's discuss. Mr. Van Arman, if</p> <p>22 you did not opt in to the Pandora-Merlin license,</p> <p>23 would Pandora have access to your label's</p> <p>24 repertoire?</p> <p>25 A. Yes, they would.</p> | 7153 | <p>1 A. I was referring to the Pandora-Merlin</p> <p>2 agreement.</p> <p>3 Q. And what is the play-share incentive in</p> <p>4 that license?</p> <p>5 A. My understanding of the play-share</p> <p>6 incentive is that Pandora --</p> <p>7 Q. Hold on, Mr. Van Arman.</p> <p>8 MR. CHOUDHURY: If we're going to talk</p> <p>9 about the specifics of the license, we should go</p> <p>10 into restricted session.</p> <p>11 CHIEF JUDGE BARNETT: I think that is a</p> <p>12 good plan. Anyone in the courtroom who has not</p> <p>13 signed the nondisclosure certificate, please wait</p> <p>14 outside.</p> <p>15 MR. LARSON: If I could just ask: Is</p> <p>16 this just Merlin restricted? Or I mean, I guess,</p> <p>17 can one of our Pandora clients --</p> <p>18 MR. CHOUDHURY: I think your Pandora</p> <p>19 client can stay.</p> <p>20 MR. LARSON: Thank you.</p> <p>21 MR. CHOUDHURY: And I will wave the bat</p> <p>22 signal if that is not the case.</p> <p>23 (THIS ENDS PUBLIC SESSION)</p> <p>24 (RESTRICTED SESSION BOUND</p> <p>25 SEPARATELY)</p> |

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| <p>1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p> | <p>1 CHIEF JUDGE BARNETT: We will take our 2 recess. It's not fair. I'm certain you can do a 3 stellar job, Mr. Hansen, but since Mr. Thorne is 4 the one who specifically prepared, we will wait for 5 him. We will take 15 minutes and decide what we 6 will do. 7 MS. LEMOINE: Thank you, Your Honor. 8 (A short recess was taken.) 9 CHIEF JUDGE BARNETT: Please be seated. 10 MR. POMERANTZ: Your Honor, while we're 11 going to get the witness, can I take care of a 12 couple of housekeeping matters on our end? 13 CHIEF JUDGE BARNETT: Surely. 14 MR. POMERANTZ: We have agreed with all 15 of the other parties to submit three of our 16 witnesses in writing along with their -- with their 17 written testimony along with their appended 18 exhibits. 19 I'd like to offer those -- the 20 testimony and appended exhibits into evidence now. 21 CHIEF JUDGE BARNETT: All right. 22 MR. POMERANTZ: We've cleared this with 23 the other parties. 24 Those are the written testimony and 25 appended exhibits of Mr. Foster, Ms. Roberts and</p> |
| 7185 | 7187 |
| <p>1 (THIS BEGINS PUBLIC SESSION) 2 CHIEF JUDGE BARNETT: You remain under 3 oath or affirmation. Please be seated. 4 AARON HARRISON, 5 being first duly sworn, to tell the truth, the 6 whole truth and nothing but the truth, testified as 7 follows: 8 MR. HANSEN: Your Honor, Mr. Thorne was 9 going to cross-examine Mr. Harrison. I can stand 10 in for him. If you take the break sooner rather 11 than later, that will be helpful for us. 12 MR. POMERANTZ: And I agree with Mr. 13 Hansen that this has gone pretty fast, faster than 14 we thought this morning. Good news for all of us. 15 I think after Mr. Harrison, we only have Mr. Cutler 16 left for today, and I -- last I spoke with Mr. 17 Hansen about it, that he was going to be available 18 this afternoon and not this morning, so I think we 19 are probably in a very comfortable schedule for 20 today. If that is correct. 21 MR. HANSEN: I think that is correct, 22 Your Honor. 23 JUDGE STRICKLER: Who is up tomorrow? 24 MR. POMERANTZ: We only have two, Mr. 25 Wilcox and Mr. Huppe.</p> | <p>1 Professor Reisman. 2 And they would be the following 3 exhibits: SoundExchange Exhibit 6, SoundExchange 4 Exhibit 16, SoundExchange Exhibit 126, 5 SoundExchange Exhibit 18. All the rest of these 6 are SoundExchange exhibits: 164 through 172. 7 CHIEF JUDGE BARNETT: Thank you. 8 Hearing no objection, those exhibits 9 will be admitted and that testimony submitted. 10 (SoundExchange Exhibit Nos. 6, 16, 126, 11 18, 164-172 were admitted into evidence.) 12 MR. POMERANTZ: Thank you, Your Honor. 13 One other thing is I think Judge 14 Strickler, a few days ago when Mr. Kooker was here, 15 had asked for hard copies of some of the Sony 16 agreements that were part of Exhibit 80. 17 JUDGE STRICKLER: That was in my 18 conversations with Mr. Klaus. 19 MR. POMERANTZ: Yes. 20 JUDGE STRICKLER: Right. 21 MR. POMERANTZ: Yes. And we've cleared 22 these with the other parties. They're fine with us 23 submitting these. So I just wanted to hand these 24 up to you. 25 JUDGE STRICKLER: Thank you very much.</p> |

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| 7188 | <p>1 MR. POMERANTZ: They've already been</p> <p>2 previously admitted into evidence.</p> <p>3 CHIEF JUDGE BARNETT: Thank you.</p> <p>4 MR. POMERANTZ: Your Honor, one other</p> <p>5 thing Mr. Joseph reminded me. We just admitted</p> <p>6 into evidence SoundExchange Exhibit 168. And I</p> <p>7 just wanted to note for the record that that same</p> <p>8 document was previously admitted as SoundExchange</p> <p>9 Exhibit 269.</p> <p>10 CHIEF JUDGE BARNETT: In its entirety?</p> <p>11 They are exactly the same?</p> <p>12 MR. POMERANTZ: Mr. Joseph and I both</p> <p>13 think so. And I'm told that they are.</p> <p>14 CHIEF JUDGE BARNETT: Okay. Thank you.</p> <p>15 MS. LEMOINE: I'm going to begin with</p> <p>16 Mr. Harrison and go very quickly into restricted</p> <p>17 session. So perhaps we should just close the</p> <p>18 courtroom.</p> <p>19 CHIEF JUDGE BARNETT: Well, try having</p> <p>20 to do what you can with the room open, Ms. LeMoine.</p> <p>21 MS. LEMOINE: Sure. Of course.</p> <p>22 CHIEF JUDGE BARNETT: I think we're</p> <p>23 ready now.</p> <p>24 MS. LEMOINE: All right.</p> <p>25 DIRECT EXAMINATION BY COUNSEL FOR SOUNDEXCHANGE</p> | 7190 | <p>1 separate exhibit?</p> <p>2 MS. LEMOINE: This was an exhibit to</p> <p>3 the written testimony.</p> <p>4 And I just want to understand that a</p> <p>5 little better. Which portion --</p> <p>6 MR. THORNE: Your Honor, SoundExchange</p> <p>7 Exhibit 88 appears to be something that someone</p> <p>8 told Mr. Harrison who was told by somebody else</p> <p>9 told by somebody else that came from iHeart.</p> <p>10 And there's no indicia of reliability.</p> <p>11 I do not think there's any proof to the thing that</p> <p>12 Ms. LeMoine is trying to get in.</p> <p>13 MS. LEMOINE: Your Honor, this is</p> <p>14 something that -- I guess that's true. It is</p> <p>15 hearsay because it's to the extent Universal is</p> <p>16 reporting what iHeart told Universal.</p> <p>17 Is that your objection?</p> <p>18 Yeah. Then I -- but Your Honor has</p> <p>19 discretion to consider hearsay in this proceeding</p> <p>20 to the extent you find it relevant and appropriate.</p> <p>21 CHIEF JUDGE BARNETT: I think</p> <p>22 appropriate is the --</p> <p>23 MS. LEMOINE: Is the key.</p> <p>24 CHIEF JUDGE BARNETT: -- operative</p> <p>25 word. And how would you describe this as</p> |
| 7189 | <p>1 BY MS. LEMOINE:</p> <p>2 Q. Good morning, Mr. Harrison.</p> <p>3 A. Good morning.</p> <p>4 Q. Mr. Harrison, you've already testified</p> <p>5 in the direct phase of this proceeding; is that</p> <p>6 right?</p> <p>7 A. Yes.</p> <p>8 Q. Can you please remind the judges of</p> <p>9 what you do at Universal Music Group?</p> <p>10 A. Yes. I'm senior president of business</p> <p>11 and legal affairs at Universal. And I focus on</p> <p>12 negotiating deals with the digital music services</p> <p>13 for the use of our entire catalog.</p> <p>14 Q. And if you could open your binder to</p> <p>15 your Tabs 1 through 7 in there.</p> <p>16 Is that your written rebuttal testimony</p> <p>17 and the exhibits that you attach to it?</p> <p>18 A. Yes, it is.</p> <p>19 MS. LEMOINE: Your Honor, at this time</p> <p>20 we'd move to admit those Tabs 1 through 7, which</p> <p>21 are SX Exhibits 25, 81 to 86 and then 88.</p> <p>22 MR. THORNE: Objection on Exhibit 88,</p> <p>23 Your Honor. It's double or triple hearsay.</p> <p>24 CHIEF JUDGE BARNETT: Ms. LeMoine, was</p> <p>25 this an exhibit to the written testimony or a</p> | 7191 | <p>1 appropriate, Ms. LeMoine?</p> <p>2 MS. LEMOINE: Mr. Harrison offers it as</p> <p>3 part of his rebuttal testimony as an example of the</p> <p>4 back-and-forth that went on regarding the Clear</p> <p>5 Channel negotiations.</p> <p>6 But -- so he offers it as an example of</p> <p>7 what Clear Channel had offered and what -- how</p> <p>8 Universal responded and particularly how the</p> <p>9 promotions department had raised issues about the</p> <p>10 deal.</p> <p>11 MR. THORNE: Your Honor, Mr. Harrison</p> <p>12 didn't even hear anything from iHeart. His</p> <p>13 correspondent heard it from somebody else who heard</p> <p>14 it from somebody else.</p> <p>15 His immediate correspondent says at the</p> <p>16 bottom: "I do not think there is any proof to it."</p> <p>17 And it doesn't have the indicia of</p> <p>18 reliability that we would expect.</p> <p>19 CHIEF JUDGE BARNETT: 88 is refused.</p> <p>20 And the remaining exhibits are admitted.</p> <p>21 MS. LEMOINE: Thank you, Your Honor.</p> <p>22 (SoundExchange Exhibit Nos. 25, 81-86</p> <p>23 were admitted into evidence.)</p> <p>24 BY MS. LEMOINE:</p> <p>25 Q. Mr. Harrison, have you had an</p> |

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| 7192 | <p>1 opportunity to review your testimony?</p> <p>2 A. Yes.</p> <p>3 Q. Do you have any corrections or updates</p> <p>4 to your testimony at this time?</p> <p>5 A. The only update is that the Rhapsody</p> <p>6 Radio term sheet, which is Tab 2, has now been</p> <p>7 memorialized into an amendment which reflects the</p> <p>8 same terms but is just now an amendment to the</p> <p>9 overall subscription agreement.</p> <p>10 MS. LEMOINE: So let's just discuss a</p> <p>11 few points you raise in your rebuttal testimony.</p> <p>12 I think at this time I'm going to have</p> <p>13 to go to restricted.</p> <p>14 CHIEF JUDGE BARNETT: Those of you in</p> <p>15 the hearing room who have not signed the</p> <p>16 nondisclosure certificate please wait outside.</p> <p>17 (THIS ENDS PUBLIC SESSION)</p> <p>18 (RESTRICTED SESSION BOUND</p> <p>19 SEPARATELY)</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> | 7232 | <p>1 (THIS BEGINS PUBLIC SESSION)</p> <p>2 CHIEF JUDGE BARNETT: Good afternoon.</p> <p>3 Please be seated, all except the witness.</p> <p>4 STEVEN CUTLER,</p> <p>5 being first duly sworn, to tell the truth, the</p> <p>6 whole truth and nothing but the truth, testified as</p> <p>7 follows:</p> <p>8 DIRECT EXAMINATION BY COUNSEL FOR</p> <p>9 IHEARTMEDIA</p> <p>10 BY MR. THORNE:</p> <p>11 Q. Mr. Cutler, would you please state your</p> <p>12 name and spell your last name.</p> <p>13 A. Sure. Steven Cutler, C-U-T-L-E-R.</p> <p>14 Q. Is that Steven with a V?</p> <p>15 A. Steven with a V.</p> <p>16 MR. THORNE: Your Honors, this will be</p> <p>17 public at least until we get to the questions about</p> <p>18 details that are restricted.</p> <p>19 CHIEF JUDGE BARNETT: Okay.</p> <p>20 BY MR. THORNE:</p> <p>21 Q. Mr. Cutler, what is your title?</p> <p>22 A. My title is executive vice president,</p> <p>23 business development and corporate strategy at</p> <p>24 iHeartMedia.</p> <p>25 Q. How long have you been in that</p> <p>position?</p> |
| 7193 | <p>1</p> <p>2</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> | 7233 | <p>1 A. About three and a half years.</p> <p>2 Q. What does your position involve?</p> <p>3 A. So I essentially work on key topics for</p> <p>4 the CEO, so it can range from strategic</p> <p>5 transactions, sometimes working on cost</p> <p>6 initiatives, putting together materials for our</p> <p>7 board of directors or investors, but it can vary a</p> <p>8 little bit depending on how his priorities shift.</p> <p>9 Q. Does that responsibility include</p> <p>10 helping control licensing costs?</p> <p>11 A. Yes, it does.</p> <p>12 Q. Is it important to control licensing</p> <p>13 costs?</p> <p>14 A. For us, it is very important.</p> <p>15 Q. Why is that?</p> <p>16 A. Just -- as it stands right now, our</p> <p>17 digital business does not have a sustainable set of</p> <p>18 economics.</p> <p>19 Q. Would you please --</p> <p>20 MR. THORNE: Your Honors, you have in</p> <p>21 front of you a thickish binder. The good news is</p> <p>22 we're not going to go through very much of it.</p> <p>23 JUDGE STRICKLER: Begging the question,</p> <p>24 why do we have it?</p> <p>25 MR. THORNE: This is Mr. Cutler's</p> |

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| 7234 | <p>1 written testimony and all of the exhibits that were 2 originally attached to it -- many of them have 3 already been entered into evidence, so we're not 4 going to move very much more in. 5 BY MR. THORNE: 6 Q. Mr. Cutler, would you look at the first 7 tab which is iHeart Exhibit 3338. 8 A. Okay. 9 Q. Do you recognize that? 10 A. Yes. This is my testimony. 11 Q. Is that your signature on the back 12 page? 13 A. Yes, it is. 14 Q. Is your testimony still correct? 15 A. Yes, it is. 16 MR. THORNE: We offer iHeart Exhibit 17 3338. 18 MR. CHOUDHURY: No objection. 19 CHIEF JUDGE BARNETT: 3338 is admitted. 20 (iHeartMedia Exhibit 3338 was admitted 21 into evidence.) 22 BY MR. THORNE: 23 Q. Mr. Cutler, would you look at briefly, 24 just thumb through the other tabs in your binder. 25 Are those the other exhibits -- are</p> |
| 7236 | <p>1 (iHeartMedia Exhibit 3346 was admitted 2 into evidence.) 3 (iHeartMedia Exhibit 3348 was admitted 4 into evidence.) 5 (iHeartMedia Exhibit 3350 was admitted 6 into evidence.) 7 BY MR. THORNE: 8 Q. Mr. Cutler, you stated in your written 9 testimony that iHeart's primary strategy for 10 reaching across music licensing is to pursue direct 11 licenses with record labels. 12 Could you tell us a little bit about 13 that? 14 A. Sure. It was, and continues to be a 15 primary way that we are trying to make the 16 economics suitable for this business, that we can 17 essentially promote the business, grow the business 18 and invest in the business. 19 Q. Have you attempted to negotiate direct 20 licenses with some of the labels? 21 A. Yes, we have. 22 Q. Can you briefly describe who you 23 negotiated with and where, if anyplace, you have 24 been successful? 25 A. Sure. So our first deal that we signed</p> |
| 7235 | <p>1 those exhibits things that were attached to your 2 written testimony? 3 A. Yes. Let me just sort of flip through 4 as you said, but yes. 5 MR. THORNE: Your Honors, as I 6 mentioned, many of these have already been admitted 7 into evidence. We would offer now Exhibits 3339, 8 3341, 3346, 3348 and 3350. 9 MR. CHOUDHURY: No objection. 10 CHIEF JUDGE BARNETT: Those exhibits 11 are admitted. 12 I'm sorry. I don't have 3346. 13 MR. THORNE: They are in the same order 14 as they were attached to his testimony. 3346, for 15 example, I think it is third from the last. It is 16 Tab 31. 17 CHIEF JUDGE BARNETT: Thank you. Got 18 it. Thank you. 19 MR. THORNE: Those exhibits are 20 admitted, Your Honor? 21 CHIEF JUDGE BARNETT: Yes, they are. 22 (iHeartMedia Exhibit 3339 was admitted 23 into evidence.) 24 (iHeartMedia Exhibit 3341 was admitted 25 into evidence.)</p> |
| 7237 | <p>1 with was an independent label, Big Machine Records, 2 a pretty significant independent label, Taylor 3 Swift, a number of other well-known artists on that 4 label. We subsequently signed a deal with Glass 5 Notes, also I think a pretty notable independent 6 label, and we subsequently signed -- I want to say 7 25 additional independent labels and we also signed 8 a deal, a direct deal with Warner Music Group, 9 which, you know, in our mind, was a tremendous 10 success getting all of that done. 11 Q. Just for the judges' reference, could 12 you look in the front pocket of your binder. 13 This is iHeart Exhibit 3034, one of the 14 pages from Professor Fischel's testimony. This is 15 already in evidence, but I thought this might be 16 the quickest way to take a look at it. 17 Could you look at that list, Mr. 18 Cutler, and tell me, are these the independent 19 record label deals that you have? 20 A. Yes, that's correct. 21 Q. Were you personally involved in 22 negotiating these independent record label deals? 23 A. I have a team but I was involved in 24 every one of them. 25 Q. What about the Warner deal? Were you</p> |

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| 7238 | <p>1 involved in that?</p> <p>2 A. Yes, I was.</p> <p>3 Q. So what was the basic -- I don't want</p> <p>4 to oversimplify this, but what was the basic idea</p> <p>5 for these deals? Did you offer something that was</p> <p>6 attractive? Did they offer something to you that</p> <p>7 was attractive?</p> <p>8 A. So the basic idea was, in exchange for</p> <p>9 relief on royalty payments, we agreed and</p> <p>10 ultimately did play these music labels tracks more</p> <p>11 digitally, and so they in return received, you</p> <p>12 know, greater amounts of promotion and because of</p> <p>13 the way the deals work, even though the rate may</p> <p>14 have been lower, the additional plays actually</p> <p>15 resulted in more money being paid to the labels.</p> <p>16 So, you know, in our minds, it was a</p> <p>17 win-win. We were able to achieve lower royalty</p> <p>18 costs. The labels were able to get greater</p> <p>19 promotion for their artists while also making more</p> <p>20 money in the end.</p> <p>21 JUDGE STRICKLER: Mr. Cutler, good</p> <p>22 afternoon. Question for you. By playing more at</p> <p>23 lower rates for these 27 record labels, did you</p> <p>24 therefore play other record labels less?</p> <p>25 THE WITNESS: Well, you know, it is --</p> | 7240 | <p>1 essentially gives us the freedom to talk about the</p> <p>2 service on the air, promote the service on the air,</p> <p>3 knowing that such a large portion of the content</p> <p>4 has these kind of favorable economics whereas</p> <p>5 before, you know, if we had one deal with Big</p> <p>6 Machine, okay, that is a start, but that is two</p> <p>7 percent of your plays, so do you want to sing from</p> <p>8 the treetops about promoting your service if you</p> <p>9 only have two percent.</p> <p>10 JUDGE STRICKLER: Are you saying you</p> <p>11 have enough money, more money left over in the</p> <p>12 budget to promote the service, because these</p> <p>13 agreements are win-wins, the labels get more money,</p> <p>14 you pay out less overall because you are paying out</p> <p>15 less to other labels, and therefore, there is money</p> <p>16 left over to promote and grow the entire service?</p> <p>17 THE WITNESS: You know, it is an</p> <p>18 interesting way to think about it. I don't think</p> <p>19 about it exactly that way, but you are right.</p> <p>20 There is, you know, we have saved money and -- but</p> <p>21 we have so many radio stations and we talk about</p> <p>22 the service so much on air that we wouldn't really</p> <p>23 spend that savings to go market the service, but</p> <p>24 really, what it would help us do is understand,</p> <p>25 wait a minute, all of a sudden, the service now has</p> |
| 7239 | <p>1 a question I think you are getting at is share</p> <p>2 versus overall volume.</p> <p>3 JUDGE STRICKLER: I meant share, yes.</p> <p>4 THE WITNESS: Certainly, the share has</p> <p>5 to -- its math has to add up to a hundred, so if</p> <p>6 someone goes from 20 to 30, the rest of the pool</p> <p>7 must -- those ten points must come from somewhere</p> <p>8 else, but the thing that we found was that is that</p> <p>9 after you are able to put enough of the catalog</p> <p>10 into this kind of economic framework, you feel good</p> <p>11 about promoting the entire service, so the whole of</p> <p>12 the entire service, the volume of the entire</p> <p>13 service goes up, so even folks who maybe didn't do</p> <p>14 a direct deal may actually be getting paid more as</p> <p>15 well, just because the entire service has gone up</p> <p>16 even if their share has gone down.</p> <p>17 JUDGE STRICKLER: Why doesn't the</p> <p>18 entire service go up as a consequence of having</p> <p>19 these play share or steering arrangements?</p> <p>20 THE WITNESS: It's a question of having</p> <p>21 enough of -- I want to say that between the</p> <p>22 independent labels and Warner, particularly after</p> <p>23 we did some of this boosting that I am talking</p> <p>24 about, you know, a big chunk of our plays were</p> <p>25 through this direct licensing economics, which</p> | 7241 | <p>1 sustainable economics, we can feel good about</p> <p>2 marketing it, we can go out and promote it. We can</p> <p>3 have another music festival and tell the public</p> <p>4 about our service.</p> <p>5 JUDGE STRICKLER: Have you received any</p> <p>6 responses or -- I'll leave it at that.</p> <p>7 Have you received any responses from</p> <p>8 record labels that did not enter into these</p> <p>9 agreements, that have been disappointed by reduced</p> <p>10 share or expressed disappointment?</p> <p>11 THE WITNESS: You know, I'm not -- I</p> <p>12 don't explicitly -- I have not received any mail</p> <p>13 from any music labels who have not done a deal with</p> <p>14 us saying they are horribly disappointed with</p> <p>15 iHeartMedia.</p> <p>16 By the way, I should mention as a, you</p> <p>17 know, an aside to that, you know, we went and</p> <p>18 talked to really everyone so this wasn't meant to</p> <p>19 be an exclusionary exercise where, you know, we</p> <p>20 were going to say some people were not, you know,</p> <p>21 available to do it with.</p> <p>22 JUDGE STRICKLER: Thank you.</p> <p>23 BY MR. THORNE:</p> <p>24 Q. Following up on Judge Strickler's</p> <p>25 question, an earlier witness told us that iHeart</p> |

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| <p>1 attempted to reach a deal with Universal; is that 2 correct? 3 A. Yes. 4 Q. And did that succeed or fail? 5 A. We did not reach an agreement with 6 Universal. 7 MR. CHOUDHURY: Objection, Your Honor. 8 There is nothing in the testimony about approaching 9 Universal. 10 MR. THORNE: Just following up on Judge 11 Strickler's question, but I'll withdraw the 12 question. 13 CHIEF JUDGE BARNETT: Thank you. 14 BY MR. THORNE: 15 Q. Mr. Cutler, talk about the contracts 16 for a second. I want to take it in two batches, 17 the independents and the Warner contract. Do the 18 independents -- 19 CHIEF JUDGE BARNETT: Mr. Thorne, I am 20 having difficulty hearing you. If you could put 21 that more directly in front of you. 22 MR. THORNE: Is that better, Your 23 Honor? 24 CHIEF JUDGE BARNETT: A little bit. 25 And if you could speak up.</p> | <p>1 Q. That is both Warner and the 2 independents? 3 A. Correct. 4 Q. Does that cover your simulcast service 5 only or your custom service only or both? 6 A. It's both. 7 Q. So is the Warner share boost that you 8 were expecting exactly 50 percent? 9 A. It is a -- Warner is a little bit more. 10 What we put in the contract is that we would pay on 11 one side of the deal for a share of 31 and a half 12 percent recognizing that they were starting at 20. 13 MR. CHOUDHURY: Your Honor, we are 14 getting into confidential terms including Warner 15 terms. I don't think this should be done in open 16 session. 17 MR. THORNE: We should probably close 18 the courtroom for this. 19 CHIEF JUDGE BARNETT: We are going to 20 close the hearing room for this session, for this 21 portion of the testimony. 22 (THIS ENDS PUBLIC SESSION) 23 (RESTRICTED SESSION BOUND SEPARATELY) 24 25</p> |
| 7243 | 7245 |
| <p>1 MR. THORNE: Will do. 2 BY MR. THORNE: 3 Q. Do the independent contracts require 4 iHeart to play their music more? 5 A. None of the contracts actually require 6 us to play the content more. The contracts are 7 actually designed so that we are economically 8 incentivized to play the tracks more. 9 Q. What about the Warner contract? Does 10 that require you to play Warner music more? 11 A. That one also does not require it, but 12 what it does is, it says that we will pay up to a 13 certain boosted level on one part of the service, 14 so not to -- sorry, if it is too much detail, it 15 doesn't require us to play, but it requires us to 16 pay, which creates that incentive that I was 17 mentioning to -- actually, if you are going pay for 18 it, you should be playing it. 19 Q. And the Warner contract, does that 20 require you to play -- sorry, I just asked that 21 question. Good. I'll move on. 22 How much more do you expect to play the 23 independents and Warner music? 24 A. So our target was to boost the share of 25 these partners' plays by 50 percent.</p> | <p>1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p> |

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I, Bonnie L. Russo, do hereby certify that the foregoing transcript is a true record of the proceedings to the best of my ability, that I am not related to or employed by any of the parties involved in these proceedings, and, further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, or financially interested in the proceedings.

Notary Public

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